No. 91-2051

In The

Supreme Court of the United States

October Term, 1992

STATE OF SOUTH DAKOTA, in its own behalf, and as Parens Patriae,

Petitioner,

v.

GREGG BOURLAND, Personally and as Chairman of the Cheyenne River Sioux Tribe and DENNIS ROUSSEAU, Personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Act of September 3, 1954, ch. 1260, 68 Stat. 1191, divested the Cheyenne River Sioux Tribe of its authority to regulate non-Indians hunting and fishing on reservation lands which were acquired by the United States for the construction and operation of a federal flood control project in light of: (1) the United States' pledge to restore the Tribe to its condition prior to the construction of the Reservoir; (2) the Tribe's retention of substantial rights in the acquired lands; and (3) the fact that continued tribal authority is consistent with the purposes for which the lands were acquired.

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INTRODUCTION

In this case, a unanimous Court of Appeals ruled that the Cheyenne River Sioux Tribe may continue to regulate non-Indian hunting and fishing on the reservation lands which were taken from the Tribe and its members by the federal government for use in connection with the construction and operation of Oahe Reservoir. *South Dakota v. Bourland,* 949 F.2d 984 (8th Cir. 1991) (reprinted in the

Petitioner's Appendix (hereinafter "App.") at A-1). The lands in question were acquired by the United States under special federal legislation, the Act of September 3, 1954, ch. 1260, 68 Stat. 1191 (hereinafter "the Cheyenne River Act" or "the Act") (App. A-195), which had two purposes: (1) "the acquisition of [Indian] lands . . . required for the reservoir . . . [and (2)] the rehabilitation of the Indians of the Cheyenne River Sioux Reservation." *Id.* at 993 (App. A-33). The United States also obtained lands on the Reservation from non-Indians under the Flood Control Act of December 22, 1944, ch. 665, 58 Stat. 887, and the Eighth Circuit remanded the question of whether the Tribe could regulate such activities on the former non-Indian lands used in connection with the reservoir. The acquired tribal lands along with those obtained from non-Indians are commonly referred to as "the taken area."

In recognizing the continuing tribal authority over the former trust lands, the appellate court examined the Cheyenne River Act to ascertain its underlying intent and concluded that nothing in the language of the Act or its history suggested that Congress meant to diminish the Tribe's jurisdiction over hunting and fishing on the lands acquired by the federal government from the Tribe and its members. Rather, as the Court of Appeals explained, "the purpose of the Act was simply to enable the United States to acquire the land needed for the construction of Oahe Dam and Reservoir and to do so with as little disruption as possible to the life of the Tribe." *South Dakota v. Bourland*, 949 F.2d at 994 (A-40).

The Court of Appeals carefully considered the extensive authority of this Court related to the retained authority of Indian tribes and the application of those principles in instances in which a tribe seeks to regulate the activities of non-Indians. Because the lower court correctly applied the prior decisions of this Court in analyzing the Cheyenne River Act which only applies to the Cheyenne River Reservation and because the activities in question take place on the lands of the Tribe's guardian, the United States – which supported the Tribe's position in both the district court and the Court of Appeals – there is no need for this Court to review the decision of the Court of Appeals.

STATEMENT OF THE CASE

The eastern boundary of the Cheyenne River Reservation is the "center of the main channel of the Missouri River." Act of March 2, 1889, ch. 405, § 4, 25 Stat. 888; compare *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 319 (1942). Historically, the River and bottom lands were the heart of tribal life on the Reservation. Minnicoujou, the name of one of the four bands of the Cheyenne River Sioux, translates as "Planters by the water." GARY E. MOULTON, THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION 109 n.2 (1983). The original Cheyenne River Indian Agency, was near the site where Charger's Band of Sans Arc Sioux, another Cheyenne River Band, were located along the bottom lands of the River. H. R. Exec. Doc. No. 104, 51st Cong., 2 Sess. (1890). Although the Tribe lost

lands to non-Indian homesteading under the Surplus Lands Acts, the majority of the reservation lands along the Missouri River were not opened to non-Indian homesteading and the River and its bottom lands continued to play a vital role in tribal life until they were flooded by Oahe Reservoir. *See* Act of May 29, 1908, ch. 216, 35 Stat. 444.

The Tribe has continuously asserted jurisdiction over "all hunting and fishing activities on the reservation" including the area that is now held by its trustee, the United States. District court opinion (A-72).[1] Under the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, the Tribe adopted a constitution which was approved by the Secretary of the Interior and which provided that "[t]he council shall pass ordinances for the control of hunting and fishing upon the reservation . . . ." By-Laws, art. VII, § 2, Exh. 1. In 1937, the Tribal Council enacted tribal ordinances, also approved by the Department of the Interior, which regulated hunting, fishing and trapping and which governed tribal members and "any nonmenber . . . within the Reservation." Exh. 3. The tribal constitution provided for tribal jurisdiction throughout the reservation which included non-Indian lands. *Solem v. Bartlett*, 465 U.S. 463 (1984).

The Tribe's early conservation efforts were instrumental in the restoration of the wildlife on the Reservation and received national recognition. Exh. 61. At the

[1] The district court opinion is not reported. It is reprinted at App. A-56 to A-160.

time of the passage of the Cheyenne River Act, hunting and fishing were important tribal activities. *See, e.g.*, H.R. Rep. No. 1047, 81st Cong., 1st Sess. 4 (1949) (Interior Report stating that the construction of Oahe Reservoir would result in the loss of "[w]ildlife which provides important feed for over 100 families" on the Cheyenne River Reservation).

The Cheyenne River Act was passed to enable the United States to acquire Indian lands on the Cheyenne River Sioux Reservation for the construction of Oahe Dam and Reservoir, which were part of the comprehensive plan for the improvement of the Missouri River Basin authorized under section 9 of the Flood Control Act of December 22, 1944, 58 Stat. 887, 891. H.R. Rep. No. 2484, 83d Cong., 2d Sess. 1 (1954). "The stated purposes of Lake Oahe were to allow 'the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes.' " *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 502 (1988), *quoting* S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944); *see also* section 10 of the Flood Control Act. The recreational use of the Project was of little significance and received only passing mention.

Although the Secretary of the Army was authorized to acquire lands necessary for the project under section 3 of the 1944 Act, additional authority was required for the acquisition of the Indian lands along the River. *See United States v. 2005.32 Acres of Land, More or Less*, Civil No. 722 N.D. (S.D. 1958), *reprinted in* H.R. Rep. No. 1888, 85th Cong., 2d Sess. 35 (1958); *see also United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976). The

Cheyenne River Act stemmed from lengthy negotiations between the United States and the Tribe authorized by the Act of September 30, 1950, ch. 1120, 64 Stat. 1093. *See* H.R. Rep. No. 2484, *supra*. Although the Cheyenne River Act allowed the United States to acquire Indian lands on the Reservation, Congress expressed its intent to restore the condition of the Indian people after taking their most productive lands. In addition, a "[s]ignificant portion of the 'bundle of property rights' [in the taken area] explicitly were preserved for the Tribe." *South Dakota v. Bourland*, 949 F.2d at 993 (App. A-36).

When it passed the Cheyenne River Act, Congress noted the disastrous impact the Act would have on the Tribe. The Interior Committee explained that the construction of the Oahe Dam and Reservoir would "result in the flooding of over a third of a million acres of rich bottom land along the Missouri River." Indian families would be "faced with forced evacuation before 1961, when the project will be completed." H.R. Rep. No. 2484 at 5-6. The sacrifice imposed on the Tribe was described by the Committee:

> Through no action of their own, the Indians must give up their homeland, their homes will be lost, their cattle raising industry will be ruined, many of their subsistence pursuits will be curtailed, their churches, schools, and social life will be completely disrupted, the residue of their lands will be reduced to a small fraction of their present value.

Id. at 6. The prediction of the suffering of the Indian people has proved true. *See* district court opinion (A-141 to A-142).

The Tribe has consistently exercised regulatory authority over the taken area. That authority is directly related to the retained tribal interests in the taken area where, as contemplated by the Act, the Tribe has sole responsibility for the leasing of the lands. Non-Indian hunting directly effects the Tribe's ability to use the taken area for the grazing purposes authorized under the Act. As the district court held, non-Indians hunting and fishing on the taken area have harassed tribal cattle, failed to close gates and have let down wires on fences. District court opinion (App. A-78).[2]

The Tribe likewise has a substantial interest in the fish and wildlife that is harvested on the taken area. "Virtually all the land adjacent to the taking area is trust land." *Id.* at (App. A-77). Thus, "[t]ribal lands contribute to the well-being of the deer herds on the taking area . . . ," *Id.*, and "[d]eer harvested by nonmember hunters on the taken area . . . reduce the amount of deer available to tribal members." *Id.* at (App. A-75). Without the early tribal regulations, there might not be any deer herds at all. There is a major walleye fishery on the

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[2] The district court rationalized this behavior by saying that tribal members engaged in the same conduct. But there was no testimony that the problems created by members were anywhere near as pervasive as those by non-Indians. In any event, the Tribe has authority to curtail the supposed activities of tribal members. The Court of Appeals never addressed the Tribe's challenge to the district court determinations along these lines.

Reservation which comes from natural recruitment from the Reservation and the adjacent waters of the Standing Rock Reservation. Fielder, TR at 85. In fact, the recruitment on the two Reservations supplies the fishery for the entire upper third of the reservoir. Even the eggs for the hatchery fish that supply the population in the remainder of the reservoir are taken from Reservation waters. Hanten, TR at 52.

Following a six day trial, the district court rejected the State's argument that the Cheyenne River Act resulted in the diminishment of the Reservation but concluded that the Tribe and its officials were barred from regulating nonmember hunting and fishing on the taken area. District court opinion (A-159). The court also held that the Tribe could not regulate nonmember hunting and fishing on reservation lands which were no longer held in trust. *Id.*

Supported by the United States as amici curiae, the tribal defendants appealed the district court's holding as to the taken area. The tribal defendants did not appeal the district court's holding based on *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), that the Tribe had lost its authority to regulate hunting and fishing on the non-Indian owned reservation land outside the taken area.

The Court of Appeals determined that the Tribe retained authority to regulate non-Indian hunting and

fishing on the former trust lands that are now part of the federal taken area. *South Dakota v. Bourland*, 949 F.2d 984 at 995 (A-42). The court did not address the tribal defendants' challenges to the district court's findings about the impact on the Tribe of denying it regulatory authority on these lands. The question of tribal authority over former non-Indian lands on the taken area, however, was remanded to the district court by the Eighth Circuit which found the district court's factual findings inadequate to deal with the issue. *Id.* at 995-96 (App. A-43 to A-46). No trial has been held on remand.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO ISSUE OF GENERAL APPLICABILITY

The decision below turns on the Court of Appeals' interpretation of the Cheyenne River Act. *South Dakota v. Bourland*, 949 F.2d at 991 (App. A-27). That Act was the result of lengthy negotiations between the Tribe and representatives of the United States and is unique to the Cheyenne River Reservation. Indeed, each of the acts authorizing the acquisition of lands from the tribes along the Missouri River for use in the Flood Control Projects is different in certain aspects. *See Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 821 n.13 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). As the State acknowledges, South Dakota has treated each differently. *See* Pet. at 41 n.13. Moreover, the Act is the product of the particular history of the exercise of tribal jurisdiction over hunting and fishing on the Cheyenne River Reservation where,

with the approval of the Secretary of the Interior, the Tribe had actively sought to restore game populations and to manage the reservation wildlife resources for many years prior to the passage of the Act. The Court of Appeals carefully analyzed the language of the Act, its history, and its surrounding circumstances to conclude that the Tribe retained authority over non-Indians hunting and fishing on former trust land on the taken area following the passage of the Cheyenne River Act.

South Dakota and the amici curiae States – none of whom presented their views to the Court of Appeal – overreach when they argue that the Court of Appeals' decision opens the door to widespread litigation over the rights of tribes to regulate non-Indian activities with regard to federal lands within Indian Reservations. That question turns on the intent of Congress, as the Court of Appeals acknowledged.

Congress has treated the acquisition of tribal lands and resources differently, depending on the purposes for which the tribal interests were acquired. For example, under the Federal Power Act, 16 U.S.C. § 797(e) (1988), the Federal Energy Regulatory Commission may issue hydroelectric licenses, even when the facilities are located on Indian Reservations. The Power Act requires the Commission to find that such licenses are consistent with the purposes for which the Reservation was created. *Id. See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). Significantly, the Commission is expressly authorized to condition licenses with regard to the regulation and use of wildlife located within the license boundary. 16 U.S.C. § 797(e) (1988).

The upshot is that each federal acquisition of tribal land must be judged independently in light of the congressional purposes for the federal project in question. That is exactly the course followed by the Court of Appeals. There is no need for this Court to review the decision below because that decision interprets legislation that is applicable only to the Cheyenne River Indian Reservation and raises no issue of general significance.

II. THE COURT OF APPEALS PROPERLY APPLIED THE DECISIONS OF THIS COURT

A. *Montana v. United States* and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, do not control this case.

South Dakota is wrong when it argues that the lower court failed to pay proper deference to the decisions of this Court in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).[3] The Court of Appeals conscientiously analyzed and applied those opinions but concluded that they did not forclose continued tribal authority in the circumstances before it. *See South Dakota v. Bourland*, 949 F.2d at 991 (App. A-24 to A-27). In deciding that it must consider the congressional intent underlying the Cheyenne River Act, the Court of Appeals

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[3] As noted above, the district court relied on the teachings of those two cases to foreclose the Tribe from regulating hunting and fishing on non-Indian lands outside the taken area. The tribal defendants did not appeal that portion of the trial court's ruling.

quoted Justice White's plurality opinion in *Brendale*, 492 U.S. at 422-23, discussing this Court's opinion in *Montana*, 450 U.S. at 559:

> We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee lands in *Montana*. . . . [W]e concluded that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the *ultimate destruction of tribal government.*"

South Dakota v. Bourland, 949 F.2d at 991 (App. A-26 to A-27), *quoting Brendale*, 492 U.S. at 422-23 (citations omitted) (emphasis added). Thus, the Eighth Circuit's analysis of the regulatory question was premised directly on this Court's reasoning in both *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408.[4]

Montana, 450 U.S. 544, and *Brendale*, 492 U.S. 408, construed the policy of the allotment acts as directed towards the elimination of tribal governmental authority

[4] Incredibly, South Dakota attacks this aspect of the lower court decision on the basis that the statement in *Montana* about the effect of the allotment acts was only a footnote in response to the views of the lower court in that decision. Pet. at 26-27. South Dakota never addresses Justice White's clear statement in *Brendale* on which the Court of Appeals actually relied.

and concluded that the affected tribes no longer had authority over lands which passed out of Indian ownership as a result of legislation enacted pursuant to that policy. *Montana*, 450 U.S. at 559; *Brendale*, 492 U.S. at 423 (White, J.), 437 (Stevens, J.). The Court of Appeals correctly refused to accept South Dakota's reading of those cases – repeated here – as establishing a *per se* rule that the removal of tribal lands from trust status automatically obviates tribal jurisdiction over non-Indian activities on the lands and that there is no need to ascertain congressional intent in that regard. Instead, the Court of Appeals, consistent with the long-standing jurisprudence of this Court, examined the subsequent alienation of the lands in the Cheyenne River Act to resolve the question before it.[5]

The Cheyenne River Act is unequivocal that its sole purpose was to acquire the lands required for the construction and operation of Oahe Dam and Reservoir. *See Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d at 820 ("[T]he reservation lands were taken for flood control projects rather than for settlement."). That task was to be

[5] For the first time in this case, South Dakota, joined by the amici States, advocates in its Petition that *Montana* stands for the proposition that the Tribe's power to regulate stems only from its power to exclude and that once the Tribe is divested of its exclusionary authority, it may not continue to regulate the use of reservation resources on former trust lands now held by the United States. The short answer is that *Montana* does not address the question presented here. Nor is there any indication in *Montana* that when, by agreement with the United States, a tribe preserves certain interests in lands in which it originally had complete title, it may not continue to exercise regulatory authority over the use of those lands, even if it may not completely exclude non-Indians from the lands.

accomplished under a policy of restoring the Indian people of the Cheyenne River Reservation "to a condition not less advantageous" than prior to the Act. 68 Stat. at 1192 (App. A-200). There is no tension between the purposes for which the United States acquired the reservation lands and the continued tribal jurisdiction recognized by the appellate court.

The Tribe also unquestionably retained substantial interests in the lands to which the United States took title: In section VI, the Tribe reserved its mineral rights in the area (App. A-201); under section VII, the Tribe has the right to all timber in the area (App. A-202); and, under section X, the Tribe has the right to use the land for grazing as well as hunting and fishing. (App. A-205) These reserved interests and rights to use the land are entitled to great weight in analyzing the retained tribal sovereignty over the land in question since " 'use' is among the 'bundle of privileges that make up property or ownership' of property. . . . " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973) (Supreme Court holds that New Mexico may not apply its compensating use tax to tribal improvements on off-reservation land leased by the tribe.).

Thus, the Cheyenne River Act stands in stark contrast to the General Allotment Act of 1887, 25 U.S.C. § 331, and its progenies which are analyzed in *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408, and which have been construed to divest tribes of all their interests in the lands which passed out of Indian ownership and to allow non-Indians to obtain unrestricted title to reservation lands. *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981).

Further, unlike the legislation in *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408, which was aimed at the destruction of tribal governments, the passage of the Cheyenne River Act followed the repudiation of the allotment policy and the reaffirmation of tribal sovereignty in the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.). *See Montana*, 450 U.S. at 559 n.9.[6]

To conclude, the Court of Appeals was correct in refusing to apply the holdings in *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408, to this case without considering the purposes of the Cheyenne River Act.

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[6] South Dakota also errs when it attempts to invoke the termination policy as a component of the Cheyenne River Act. First, the State is incorrect in asserting that Congress meant the Cheyenne River Act to constitute a back-door termination act. The expressed purpose of the Act was to restore the Tribe to the condition which existed prior to the Act. (App. A-200) Thus, the most that can be said is that those in Congress who favored the termination policy contemplated that *at some future date* it might be sought by the Tribe. *See* 100 Cong. Rec. 13,160 (1954). Congress and the executive branch have subsequently rejected the termination policy. Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1988), Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450-450m, *Special Message to the Congress on Indian Affairs* (Richard Nixon), Pub. Papers 564 (1970); *see generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 184-88 (1982 Ed.); *see also California v. Cabazon Band of Indians*, 480 U.S. 202, 216-17 (1987) (President Reagan's 1983 Statement on Indian policy, reaffirming the self-determination policy for tribes).

B. The Court of Appeals used the Standards Established by this Court to Determine the Intent of Congress.

The established canon of construction to be applied to legislation such as the Cheyenne River Act in which the federal government acquires rights from Indian tribes is that "the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (citations omitted). "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." *Id.* at 200, *quoting Choate v. Trapp*, 224 U.S. 665, 675 (1912). *See also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 116 L.Ed.2d 687, 704 (1992). Those instructions are particularly applicable here since the Cheyenne River Act was the product of actual negotiations between the Tribe and the federal government.

The Court of Appeals properly utilized these long-standing rules of construction, citing to its earlier decision in *Lower Brule*, 711 F.2d 809, where it had previously resolved the question of whether the State could regulate tribal members hunting and fishing on the federal lands on the Lower Brule Reservation. *South Dakota v. Bourland*, 949 F.2d at 990 (App. A-23). The Eighth Circuit also invoked this court's caveat in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) that "a proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the

absence of clear indications of legislative intent." *South Dakota v. Bourland*, 949 F.2d at 991 (App. A-23 to A-24). *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (Because there was "no 'clear indications' that Congress had implicitly deprived the tribe of its power to impose the severance tax . . . [the Tribe retained] its inherent authority to tax mining activities on its lands, whether this authority derives from the Tribe's power of self-government or from its power to exclude.").

Strangely, the State limits its contention that the Court of Appeals applied the wrong standard to examine the Cheyenne River Act to the lower court's citation of *United States v. Dion*, 476 U.S. 734 (1986). But in its holding that there must be "clear indications" of congressional intent to deprive a tribe of its right to regulate the use of reservation resources by non-Indians, the Eighth Circuit also cited *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), *modified on other grounds*, 444 U.S. 816 (1979), and *Menominee Tribe v. United States*, 391 U.S. 404 (1968), along with references to both *Iowa Mut. Ins. [illegible] LaPlante*, 480 U.S. 9 (1987) and *Merrion*, 455 U.S. 130. *[illegible]uth Dakota v. Bourland*, 949 F.2d at 990-91, 994 (App. A-22 to A-25, A-40 to A-41). The lower court was correct in its use of those decisions, which all discuss the standard to be used when subsequent legislation must be construed with earlier treaty rights – precisely the question before it.

III. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE CHEYENNE RIVER ACT DID NOT DIVEST THE TRIBE OF JURISDICTION OVER NON-INDIANS HUNTING AND FISHING ON FORMER TRUST LANDS ON THE TAKEN AREA

As the Court of Appeals concluded, in passing the Cheyenne River Act, Congress gave no indication that it intended to divest the Tribe of its authority to regulate all hunting and fishing on the lands which were taken from the Tribe. The Act contains only one section in which the United States acquires any interest in the taken area. The language of that section establishes that the United States took only the title to the land and cannot be read to establish an intent to divest the Tribe of its sovereign powers over the taken area.

The reading of the Act to accomplish only a transfer of title – and not a divestiture of the existing regulatory authority of the Tribe – is further confirmed by the Senate and House Reports on the bill which describe the Act as "Providing for the Acquisition of Lands By the United States." H.R Rep. No. 2484 at 1; S. Rep. No. 2489, 83d Cong., 2d Sess. 1 (1954). The House Report unequivocally states the purpose of the bill to be "reimbursing the Indians . . for lands acquired. . . ." H.R. Rep. No. 2484 at 2. And, of course, the Tribe retained substantial property interests in the lands in question.

The Tribe's continued authority to regulate hunting and fishing on the taken area is supported by the legislative history of the Act. Perhaps most telling is the statement of the attorney for the Tribe in the hearings leading up to the bill that the Tribe had authority to regulate

hunting and fishing by non-Indians on its Reservation.[7] *Acquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, South Dakota and for Other Purposes: Hearings on H.R. 2233 and S. 655 Before the Comm. on Interior and Insular Affairs Joint Senate and House Subcomm. on Indian Affairs*, 83d Cong., 2d Sess. 289 (1954) (unpublished) ("No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council.").

Congress' response in the resulting legislation was silence – an overwhelming indication that it did not intend to divest the Tribe of its authority to regulate non-Indian hunting and fishing on the Reservation. Such silence cannot support the conclusion advanced by South Dakota and the amici States that by obtaining some of the Tribe's proprietary interests in the lands and thereby modifying the Tribe's right to exclude others from the land, Congress necessarily – but sub silentio – divested the Tribe of its regulatory authority. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, this Court explained the difference between the sovereign authority of the Tribe and its proprietary interests, stating:

> It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers

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[7] By the time of the passage of the Act, it was clear that lands which were not held for the benefit of the Tribe or its members could still be part of the Reservation. At Cheyenne River, there were substantial non-Indian lands within the reservation boundaries. *See Solem v. Bartlett*, 465 U.S. 463.

> simply because it has not expressly reserved them through a contract.

Id. at 146; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 18.

The argument by South Dakota and the amici States that mere alienation is sufficient in all instances to divest a tribe of any regulatory authority therefore is doubly defective. First, it is not consistent with the prior decisions of this Court that tribal regulatory authority is not founded simply on tribal power to exclude. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 146. Equally important, it ignores both the retained tribal interests in the former trust lands and the fact that even after Congress was advised of the Tribe's claim of regulatory authority over non-Indians hunting anywhere on the Reservation (which had been approved by the Secretary of the Interior), the Act contained no language curtailing the exercise of such tribal authority on the taken area.[8]

In sum, the Cheyenne River Sioux Tribe may regulate non-Indian hunting and fishing on its lands by virtue of its

[8] In arguing that the Act is not consistent with tribal retention of jurisdiction to regulate hunting and fishing on the acquired land, the State places great weight on section 10 of the Act, contending that it only grants the Tribe and its members the right of free access to the taken area for hunting, fishing, and grazing. No more was required since the Act took only the Tribe's title to the land. Because the Tribe's sovereign powers continued unabated after enactment of the Act, the Tribe needed to retain in the Act only the right of access in order to use the resources of the taken area. Section X had been the subject of opposition by the Corps of Engineers which had sought its elimination, noting the complications it would cause. The Corps asked that the tribal lands be treated the same as any other obtained for use in the project. *See* H.R. Rep. No. 2484 at 13. The Corps' request was denied and the language of section X remained intact.

"substantial control over the lands and the resources of its reservation, including its wildlife." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983). "[T]ribes in general retain this authority." *Id. See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 152. Because the Act was silent on the question of tribal regulatory authority and because there is no conflict between the continued exercise of that authority and the purposes for which the lands were acquired by the federal government, the trustee's acquisition of tribal title to the land in question by the United States did not result in the loss of the tribal power to regulate the use of those resources in which the Tribe has a retained interest.

IV. THERE IS NO REASON FOR THIS COURT TO REVIEW THE COURT OF APPEALS' REMAND OF THE QUESTION OF TRIBAL AUTHORITY OVER FORMER FEE LANDS IN THE TAKEN AREA

South Dakota urges this Court to review the Court of Appeals' order remanding the question of tribal jurisdiction over former non-Indian land taken by the United States. There is no need for this Court to review the interlocutory order since the court of Appeals simply remanded the issue to the district court, directing it to apply "the analysis used by Justice White in his plurality opinion in *Brendale*." *South Dakota v. Bourland*, 949 F.2d at 995 (citations omitted) (App. A-45). Finding the trial court's factual findings inadequate, the Eighth Circuit instructed the trial court to "undertake a *Montana* analysis." *Id.* at 995 (App. A-46). To be sure, the Court of Appeals cautioned that the means by which the Tribe lost title to the reservation lands in question must be

considered. *Id.* at 995 n.19 (App. A-45 n.19). But the analysis directed by the Court of Appeals should be completed before this Court considers whether to review the outcome.

CONCLUSION

In arguing for review of the decision of the Court of Appeals, South Dakota never acknowledges the fundamental and far-reaching differences between the Cheyenne River Act and the General Allotment Act of 1887. This case does not turn on the policies of the Allotment Acts, but instead turns on the intent of Congress when it passed the Cheyenne River Act which applies only to the Cheyenne River Indian Reservation. The Eighth Circuit applied the well-established rules of construction of this Court in concluding that Congress did not divest the Tribe of its jurisdiction to regulate hunting and fishing on the former trust lands on the federal taken area when it passed the Cheyenne River Act. Further, the lower court merely remanded to the district court the question of jurisdiction over former non-Indian lands. Accordingly, there is no need for this Court to review the

lower court's decision and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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